



REPUBLIC OF KENYA



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**Karithi v Jamii Wholesalers Limited (Civil Case 91 of 2001)  
[2022] KEHC 15948 (KLR) (29 November 2022) (Ruling)**

Neutral citation: [2022] KEHC 15948 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CIVIL CASE 91 OF 2001  
EM MURIITHI, J  
NOVEMBER 29, 2022**

**BETWEEN**

**ALEXANDER KARITHI ..... PLAINTIFF**

**AND**

**JAMII WHOLESALERS LIMITED ..... DEFENDANT**

**RULING**

1. What is before the court for determination is a notice of motion dated September 3, 2018 and filed on June 23, 2021 by the applicant, brought under sections 1A, 1B of the *Civil Procedure Act*, section 4 (4) of the *Limitation of Actions Act*, article 159 of the *Constitution* and order 22 of the *Civil Procedure Rules*, seeking, “That the honourable court be pleased to grant leave to the applicant to execute the judgement of December 17, 2002 and the decree thereto out of time.”
2. The applicant’s case is that the delay in executing the judgment was occasioned by an error apparent on the face of the record, which was rectified by the ruling of the court of June 6, 2016. The omission of Jamii Wholesalers Limited, from the judgment as the party against whom execution was to be effected upon, and the stay of execution obtained by Lucy Weru, the director of Jamii Wholesalers Limited, made execution impossible. Since the 12 year limitation period has since lapsed, it is in the interest of justice that the applicant is allowed to execute out of time.
3. The respondent filed a notice of preliminary objection (PO) dated November 10, 2021 vehemently opposing the application. It raised 3 grounds that:
  1. The judgment dated December 17, 2002 is stale, incapable of being executed and statute barred by section 4 (4) of the *Limitation of Actions Act* and hence the application should be disallowed.
  2. That 12 years having lapsed since the delivery of the judgment, the plaintiff/applicant is guilty of prolonged and inordinate delay.



3. The application is barred in law and an abuse of the court process and ought to be struck out with costs to the defendant/respondent.
4. The court (PJO Otieno J) on February 24, 2022 issued the following consent orders as regards the hearing of the application and PO:

“The application dated November 10, 2021 is allowed and leave granted to Ms Magua & Mbatha Advocates to come on record for the defendant/judgment debtor. The application dated September 3, 2018 and the PO dated November 10, 2021 shall be heard together and by way of written submissions. The applicant/DH shall file and serve submissions within 30 days from today to enable the respondent/JD also file submissions within 30 days from the date of service. Mention on May 18, 2022 for further orders.”

### Submissions

5. The applicant did not file any submissions.
6. The respondent filed its submissions on May 18, 2022 urging that the applicant had inexcusably delayed in executing the decree herein, and equity does not aid the indolent. It urged that the reconstruction of a skeleton File was a misuse of precious judicial time and resources owing to the staleness of the judgment sought to be resuscitated. It urged that it was not invited to object to the application for the reconstruction of a skeleton file, and the skeleton record only bore the documents preferred by the applicant, thus biased against it. It urged that the court cannot exercise its discretion in favour of the applicant for want of jurisdiction, as the 12 year limitation period lapsed. It urged the court to dismiss the application in order to bring the litigation herein to an end. It urged that a judgment must be executed within 12 years from the date of its delivery otherwise it becomes legally stale and of no benefit to the decree holder, and relied on the Court of Appeal case of *M’ikiara M’Rinkanya and Another v Gilbert Kabeere M’mbijiwe (2007) eKLR*.

### Analysis and Determination

7. The applicant sought leave of the court on September 30, 2021 to serve the respondent through substituted service by advertisement in the Daily Nation, as its former advocates had declined service. It cannot therefore be true that the application for reconstruction of a skeleton file was not served upon the respondent. The contention that the skeleton record contains only documents preferred by the applicant is quite unfounded, as the record contains all documents from both parties.
8. The application and the preliminary objection (PO) are two sides of the same coin, in that, if the application is allowed, the PO will automatically stand dismissed and vice versa.
9. Section 4 (4) of the *Limitation of Actions Act* provides that:

“An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due.”
10. The purpose of the above section is to eradicate stale claims and stop the vexing of litigants. Where a judgment creditor elects to sleep on a decree, he is estopped from waking up from his slumber after



12 years have lapsed to claim his right. The law bars such claims. (See *Isaac Olang Solongo v Gladys Nanjekho Makokha (Being the administrator of the Estate Antonina Makokha (Deceased) & another [2021] eKLR*).

11. It is not in dispute that the judgment whose execution is sought to be extended was delivered in 2002. In that judgment, the applicant was awarded special damages of Kshs 288,677.50 and general damages of Kshs 480,000 less 20% contribution together with costs and interest. The applicant was however unable to execute the decree due to an error in the judgment, and he successfully sought review 8 years down the line on November 1, 2010 which was granted vide the ruling of June 6, 2016. The court file is then said to have ‘gotten wings and flown to an unknown destination’. A skeleton file was subsequently opened in 2016, but it mysteriously got lost. When all efforts to trace it had proven futile, the applicant moved the court on July 21, 2020 for leave to open a skeleton file. The court by its ruling dated February 25, 2021 issued orders that:

“A skeleton file in respect of this matter be re-opened with more legible documents. The new skeleton file shall remain under lock and key until the pending execution process is finalized.”

12. The record is clear that the applicant intended to execute the judgment herein on/or before 2010 when he discovered the error apparent on the face of the record, which required to be rectified, on application, by the court. When the same was rectified vide the ruling of 2016, the court file subsequently went missing further curtailing the applicant’s desire to execute. It can be seen from the record that the applicant zealously wrote several correspondences to court, in an effort to have the missing court file traced and/ or a skeleton file opened. It would thus be considerably unjust to punish the applicant for mistakes which were beyond his control.
13. The court cannot be the cause or source of an injustice on a party before it!
14. If it were held otherwise, in the circumstances of this case, it would occasion opportunity for judgment debtors to cause a file to disappear for just long enough to avoid the period of statutory limitation on execution.
15. This court is minded that the law of *Limitation of Actions Act* uses the words “may not” in section 4 (4) quoted above. Those words as used in that section should not be construed to call for mandatory adherence, but to give the court discretion to either allow or disallow execution even after the 12 years period has lapsed. Sections 26 and 27 of the *Limitation of Actions Act* provide for extension of time in case of fraud or mistake, ignorance of material facts in actions for negligence, etc.
16. It would appear that although no express provision is made, as in sections 26 and 27, for extension of time with regard to execution of a judgment under section 4(4) of the *Limitations of Action Act*, the principle of access to justice under article 48 of the *Constitution* of Kenya 2010 which post-dates the statute of *Limitation of Actions Act* must be taken to modify the limitation on execution in terms of Clause 7 of the Transitional and Consequential Provisions of Sixth Schedule of the *Constitution*, which requires that all law predating the *Constitution* to be interpreted with the “alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with the *Constitution*.” With respect, the decision of the Court of Appeal in *M’Ikiara M’Rinkanya and Another v Gilbert Kabeere M’Mbijiwe*, *supra*, related to the period before the *Constitution* of Kenya 2010.

***Peculiar circumstances***



17. This matter has had peculiar circumstances of loss of file and a comedy of errors on which the court, (F Gikonyo J) addressed in its ruling dated June 6, 2016 at paragraph 10 acknowledging that the applicant was unable to execute his judgment due to the wrong description of the parties when it noted as follows:

“The error I have described above completely distorted these proceedings and obscured the true description of the defendant. In addition, the error became a major source of injustice to the plaintiff who holds a judgment he cannot execute; he is divested of justice. Notably, his journey started in 1999 to date; it is far from crystallizing. In these circumstances and in the spirit of substantive justice; I am enjoined to taking a broader approach to justice in applying prescriptions of the law here. Accordingly, I think I should order a rectification of the record as well as the judgment herein to read and relate to Jamii Wholesalers Limited as the defendant.”

18. Taking the unprecedented circumstances of this case into consideration, to forestall an injustice and in dispensing substantive justice to the parties herein, this court will exercise its discretion and extend the time for execution of the valid judgment of the court awarding damages for personal injury to the plaintiff/applicant.

### **Orders**

19. Accordingly, for the reasons set out above, the court allows the applicant’s application dated September 3, 2018.
20. As a consequential order, there shall a stay of execution for thirty (30) days to permit the defendant to pay to the plaintiff the decretal sum herein before execution may be applied for.
21. The costs will be in the cause.

Order accordingly.

**DATED AND DELIVERED ON THIS 29<sup>TH</sup> DAY OF NOVEMBER, 2022.**

**EDWARD M MURIITHI**

**JUDGE**

### **Appearances**

M/S Charles Kariuki & Koome Advocates for the plaintiff/applicant.

M/S Magua & Mbatha Advocates for the defendant.

